C.S. 100L (1)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR

W.P. NO. ---2544------ OF 2004

PETITIONER :

M/s. Bhilai Cement Company (Pvt.) Ltd. (A private limited company duly registered and incorporated under the provisions of Companies Act 1956). Having its registered office at 62-63. Industrial Growth Center Borai, Post Office Rasmada, District Durg (Chattisgarh), through its Director Shri S. N. Agrawal, S/o. Late Shri K.M. Agrawal aged 42 years, R/o. Ganjpara, Durg. (Chhatisgarh State)

P.R. No. 2540/04
Presented by Shri Sanjay Jain
dated 12-8-04

VERSUS

RESPONDENTS :

1. Chairman – cum – Managing Director, Bank of Baroda having its Head Office at Mandvi, Baroda.

2. Branch Manager, Bank of Baroda, Civic Center, Bhilai, District Durg (Chhattisgarh).

(2)

PETITION UNDER ARTICLES 226 AND 227 OF THE

CONSTITUTION OF INDIA

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.2544 of 2004

M/s Bhilai Cement Company (Pvt.) Ltd.

-Versus-

Chairman-cum-Managing Director & another

POST FOR ORDER ON 12TH AUG, 2005

Sd/-
L.C. Bhadoo
Judge
11-8-2005

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Writ Petition No.2544 of 2004

M/s Bhilai Cement Company (Pvt.) Ltd.

-Versus-

Chairman-cum-Managing Director & another

Present:

Shri Manindra Shrivastava, Senior Advocate with Miss Sharmila Singhai and Shri Amrito Das Advocates:	For the petitioner.
Shri Yashwant Tiwari with Shri Amiyakant Tiwari, Advocates:	For the respondents.

O R D E R

(Passed on 12th August, 2005)

L.C. BHADOO, J.

1. The petitioner has preferred this writ petition under Article 226/227 of the Constitution of India with a prayer to issue a writ in the nature of mandamus commanding respondents No.1 and 2 to settle the bank account of the petitioner like extending necessary rehabilitation/ exemption/concession as per the guidelines issued by the RBI from time to time, further to restrain the respondents from proceeding with recovery proceedings till the matter is finally settled as per the guidelines issued by the RBI, and any other suitable relief deemed fit in the facts and circumstances of the case.

2. At the outset, Shri Manindra Shrivastava, learned Senior Counsel for the petitioner, submitted that he is pressing this writ petition only to the extent that respondents No.1 and 2 be directed to consider the case of the petitioner company for rehabilitation after examining the potential viability of the petitioner company and thereafter to act according to rehabilitation package.

3. Brief facts, as set out in the petition, necessary for the disposal of this writ petition are that the petitioner company was incorporated with the object of establishing a mini cement plant at Borai Industrial Growth Centre, Durg and in furtherance of its aims and objects the petitioner company availed loans and financial assistance from the M. P. State Industrial Development Corporation as also working capital limits from respondent No.2 for the businesses of its mini cement manufacturing plant. Due to the then adverse business conditions, ever changing economic policies, inadequate supply of essential resources like raw material, power supply etc. and further due to inadequate and delayed financial assistance, the mini cement plant could not be fully set up which led to under-utilization of plants and machineries, as a result of the aforesaid facts, the petitioner company could not perform well right from the inception and ultimately became a 'Sick SSI Industrial unit' due to erosion in its peak network to the extent of 250% of the net worth as a result of ever growing accumulated cash losses.

4. The respondent bank sanctioned the working capital financial assistance for a sum of Rs.45 lakhs w.e.f. 3-12-98. However, the same did not release the sanctioned credit facilities in time, rather was busy in appropriating the debts in liquidating the other accounts of the group in an arbitrary manner. The respondent bank in complete ignorance of the Reserve Bank of India guidelines was not only indulged in charging excessive interest then that of the agreed rates but was further busy in charging the Penal interest and capitalizing the same against the banking practice and the directions of R.B.I. issued in this regard. On account of this the petitioner company becomes a Sick Industrial Unit. Consequently, the matter was referred to the District Level Sick Industrial Unit Rehabilitation Committee (for short 'D.L.R.C.) for suggesting the means and measures for rehabilitation of the petitioner company. The matter

was considered by the D.L.R.C. in its meeting dated 28-4-99 wherein the representative of respondents No.1 and 2 was also present. In the said meeting after due examination of the then prevailing Reserve Bank of India circulars, guidelines as also the parameters issued by the directorate of industries from time to time, the Committee recommended for declaring the petitioner a sick industrial unit.

5. The next meeting of the committee was held on 14-6-99 wherein it was directed that the total loss suffered by the petitioner company be computed and thereafter the matter be placed before the committee for further consideration. In the said meeting an objection was taken by the representative of the respondent Bank that there has been reduction in the loss of the petitioner company and, therefore, it cannot be declared as a sick industrial unit. Despite successive directions of the District Level Industrial Committee for considering the aspect of sickness of the petitioner company as also for suggesting the means for revival of the petitioner company and further to join the rehabilitation package, the respondent Bank not only failed to observe the directions given to it from time to time by the chairman of the committee, but further failed to explain as to how the respondent was justified in not admitting the petitioner unit as a Sick SSI unit. Ultimately, respondent started to keep abstaining from the meetings conducted by the D.L.R.C..

6. Other financial institution namely MPSIDC not only agreed for declaring the petitioner company a sick industrial unit but further agreed for grant of concessions/exemptions as per the guidelines issued by the Reserve Bank of India from time to time. Finally, after taking into consideration all the aspects including the then prevalent circulars, guidelines issued by the Reserve Bank of India, the D.L.R.C. was pleased to declare the petitioner company as a sick industrial unit in its meeting held on 30-12-99. The decision to the said effect was communicated to the petitioner vide memo dated 13/14-1-2000. The

petitioner conveyed in writing to respondent No.2 the decision taken by the District Level Rehabilitation Committee declaring the petitioner a sick industrial unit vide letter dated 22-1-2000 with a request to extend necessary concessions as per the guidelines issued by the Reserve Bank of India. The petitioner company also submitted a detailed project report cum revival/rehabilitation proposal for revival of the petitioner company vide Annexure-P/7. The said project report was prepared on the basis of exemption/concession extended by the Reserve Bank of India to sick industrial units. However, respondents maintained total silence in this regard and contrary to the expectations of the RBI guidelines no remedial action was taken by the respondents.

7. The petitioner represented to the respondent No.2 for settlement of its account after considering rehabilitation and granting concession as per the guidelines issued by the Reserve Bank of India on 1-5-2002, but request of the petitioner failed to evoke any response from respondents No.1 and 2. Respondents No.1 and 2 were not taking any action for rehabilitation of the petitioner company as per the guidelines issued by the Reserve Bank of India. Respondents No.1 and 2 failed to confer the benefits liable to be extended to the petitioner company in terms of the guidelines of Reserve Bank of India.

8. Return has been filed on behalf of respondents in which it has been mentioned that in view of Sections 17 and 18 of the Recovery Debts Due to Banks etc. Act, 1993 (for short 'the Act') the writ petition is not maintainable, as exclusive jurisdiction has been given to the Debts Recovery Tribunal in respect of subject matter of the petition and that could be dealt with under Section 17 of the Act. Earlier the writ petition filed by the petitioner against the respondents before the High Court of Madhya Pradesh was dismissed as withdrawn by that Court. Hence, this petition is without jurisdiction and not maintainable on the principle of *res judicata*. The petitioner had

already taken all the grounds before the Debts Recovery Tribunal, M.P., therefore, the writ petition is not maintainable. It has been mentioned that contents of paras 5.3 to 5.17 of the petition are denied. The petitioner is a bad debtor and has no intention to repay the loans and debts due against the petitioner. The petitioner has not come with the clean hands before this Court. Rs.61.17 lakhs was due to respondent Bank for recovery against the petitioner as on 19-11-2001 and against their other 3 credit accounts namely M/s Gopal Traders, Rs. 14.34 lakhs as on 29-9-2000, M/s S. N. Agrawal & Company, Rs. 17.02 lakhs as on 30-6-2000, M/s S. N. Agrawal, Rs.2.06 lakhs as on 30-6-2000, total Rs.94.59 lakhs with interest payable onwards from the above date was due to the Bank. The proceeding for recovery of the debts is pending before the D.R.T., M.P.. The petitioner and all its above sister concern have not deposited any amounts towards the credit (loan/debt), principal amount or interest outstanding due on loan credit. The petitioner is bargaining to the respondents by delay and defeating the debts due against the petitioner, therefore, the writ petition be dismissed.

9. As argued by Shri Manindra Shrivastava, learned Senior Counsel for the petitioner in this petition that only the question for consideration before this Court is that as to whether in the facts and circumstances respondents have failed to act, proceed and consider the RBI guidelines for sanction of the rehabilitation package and also to find out the potential viability of the petitioner company in order to bring back the petitioner unit to a healthy track. In this connection, it is admitted position that the District Level Rehabilitation Committee constituted by the State Government considering the above aspect in its meetings held on 28-4-99, 1-5-99 and 14-6-99, declared the petitioner company as sick unit on 30-12-99, and certificate to that effect was issued by the District Level Rehabilitation Committee on 13/14-1-2000. But, the question is

whether the petitioner company was able to submit worth consideration a rehabilitation package in order to rehabilitate the petitioner company and so that the respondent bank to examine the potential viability of the petitioner company, in my opinion, merely by declaring the petitioner company as sick unit *ipso facto* does not amount to approval of the potential viability of the petitioner company so as to implement the rehabilitation committee. There is nothing on record which shows that the District Level Rehabilitation Committee after examining any rehabilitation package submitted by the petitioner company, reached to the conclusion based on the rehabilitation package that there is potential viability of the petitioner company to reach on a healthy track and there is every possibility that if the rehabilitation package is accepted and financial assistance is sanctioned to the petitioner company, then the petitioner company will be able to rehabilitate itself and start production and commercial activities so as to earn benefits in the business. It is evident from the letter dated 1-5-99 issued by the General Manager and Principal Secretary, District Level Rehabilitation Committee right from the year 1993-94 to 1998 that loss of the petitioner company was increasing and it was reached to the stage of Rs.76.60 lakhs whereas paid up capital was up to Rs.60 lakhs only.

10. The rehabilitation scheme is introduced with a purpose that unit becomes viable and starts generating revenue in order to liquidate the outstanding loans, also that the employees working in the unit are able to get their job, public money so far invested in the unit can be utilized and the loans which were advanced to the unit are repaid. But, if we look into the whole petition and the papers, the petitioner company was never able to show that how the company will be able to start the production to a profitable extent if any financial assistance and concession are granted to the petitioner company. As per the figures given by respondents in the return that the petitioner is a bad

debtor, not only the petitioner company, but the petitioner's other sister concerns were also in debt and there were outstanding loans against them of more than Rs.94 lakhs which were not being repaid to the respondents. As far as R.B.I. guidelines are concerned, even in R.B.I. guidelines it has been mentioned that a unit may be regarded as potentially viable if it would be in a position, after implementing a relief package spread over a period not exceeding five years from the commencement of the package from banks, financial institutions, Govt. {Central/State} and other concerned agencies, as may be necessary, to continue to service its repayment obligations as agreed upon including those forming part of the package, without the help of the concessions after the aforesaid period. The repayment period for restructured [past] debts should not exceed seven years from the date of implementation of the package. Based on the norms specified above, it will be for the banks/financial institutions to decide whether a sick SSI unit is potentially viable or not. Viability of a unit identified as sick, should be decided quickly and made known to the unit and others concerned at the earliest. The rehabilitation package should be fully implemented within six months from the date the unit is declared as 'potentially viable'/'viable'. While identifying and implementing the rehabilitation package, banks/financial institutions are advised to do 'holding operation' for a period of six months. This will allow small-scale units to draw funds from the cash credit account at least to the extent of their deposit of sale proceeds during the period of such 'holding operation'.

11. But, as has been mentioned above, the petitioner has not been able to show any such rehabilitation plan which requires consideration by respondents for grant of rehabilitation package. Even concessions were already granted by the MPSIDC and one time settlement was granted to the petitioner company due to continuous loss for few years. Facts of the case show that since beginning the petitioner

Company never earned any profit, it started running into losses. Not only the petitioner Company but also its sister concerns were not repaying loans in lakhs of rupees to the respondents which is evident from the return filed by the respondents. It is also common knowledge that on account of growth of the heavy industries in the field of production of cement, mini cement plants could not make a mark and success in the field of production of the cement. During the course of arguments, question was put to learned counsel for the petitioner whether he is in a position to give a list of any mini cement plant functioning with a profit, he was not able to point out any cement plant. The industry of mini cement plant has never been successful. Therefore, in view of the above, I am of the considered opinion that the petitioner has not been able to make out a prima facie case that the petitioner company is entitled for consideration by respondents for the rehabilitation package. However, it is made clear that these observations have been made while considering that whether the petitioner has been able to make out a case for direction to the respondents to consider the rehabilitation package in order to give financial assistance to the petitioner company so as to put it on a healthy track and to start production and business activities. It is also made clear that the observations made hereinabove will not disentitle the petitioner company from seeking concessions as a sick industry as per R.B.I. guidelines while considering outstanding amount against the petitioner by the D.R.T..

12. Now, coming to the question whether on account of withdrawing the writ petition filed before the High Court of Madhya Pradesh at Jabalpur and without seeking liberty to file the petition afresh, the petitioner has disentitled himself from filing this writ petition. During the course of arguments, learned counsel for the petitioner admitted that a writ petition with similar relief was filed by the petitioner company before the High Court of Madhya Pradesh at

Jabalpur and the same was withdrawn. Even the said order has not been placed on record. But, during the course of arguments, learned counsel for the petitioner submitted the said order of the Madhya Pradesh High Court for perusal of the Court. Perusal of the said order reveals that in the said order it was specifically mentioned that the petitioner is withdrawing the writ petition with liberty to raise the points before the D.R.T. Learned counsel for the petitioner argued that if the D.R.T. is not considering anything, in that case the petitioner is not debarred from filing this writ petition. It is also admitted position that so far D.R.T. has not given any decision and the matter is still pending. Looking to the above facts, I am of the opinion that when the petitioner preferred to withdraw the writ petition filed on the same facts regarding same issue before the High Court of Madhya Pradesh at Jabalpur with liberty to move to D.R.T. and accordingly, he had moved the D.R.T., therefore, the petitioner is not entitled to file this writ petition again, particularly, without any decision and order of the Tribunal is not being questioned in this writ petition. For this view I am supported by the judgment of the Hon'ble Apex Court in the matter of **Sarguja Transport Service Versus State Transport Appellate Tribunal, Gwalior and Others** reported in **AIR 1987 SUPREME COURT 88**, in which the Hon'ble Apex Court held that:

> "While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition."

13. The Hon'ble Apex Court in the matter of **Union of India and another Versus S. B. Vohra and others** reported in **(2004) 2 Supreme Court Cases 150** held that:

> "The High Court should not ordinarily issue a writ of or in the nature of mandamus and ought to refer the matter back to the Central/State Government with suitable directions pointing out the irrelevant factors which are required to be excluded in taking the decision and the relevant factors which are required to be considered therefor. The statutory duties should be allowed to be performed by the statutory authorities at the first instance."

14. In the light of above observations of the Hon'ble Apex Court, if we look into R.B.I. guidelines, in the R.B.I. guidelines also discretion as well as caution has been given to the banks and financial institutions to decide whether a sick SSI unit is potentially viable or not and in the return respondents have mentioned that the petitioner is a bad debtor and has no intention to repay the loans and debts due against the petitioner.

15. For the foregoing discussion, I am of the considered view that the petitioner has not been able to make out a case for issuance of a writ in the nature of mandamus and directions, as prayed for. The writ petition is, therefore, liable to be dismissed and the same is dismissed. There shall be no orders as to costs.

Sd/-
L.C. Bhadoo
Judge
12-8-2005